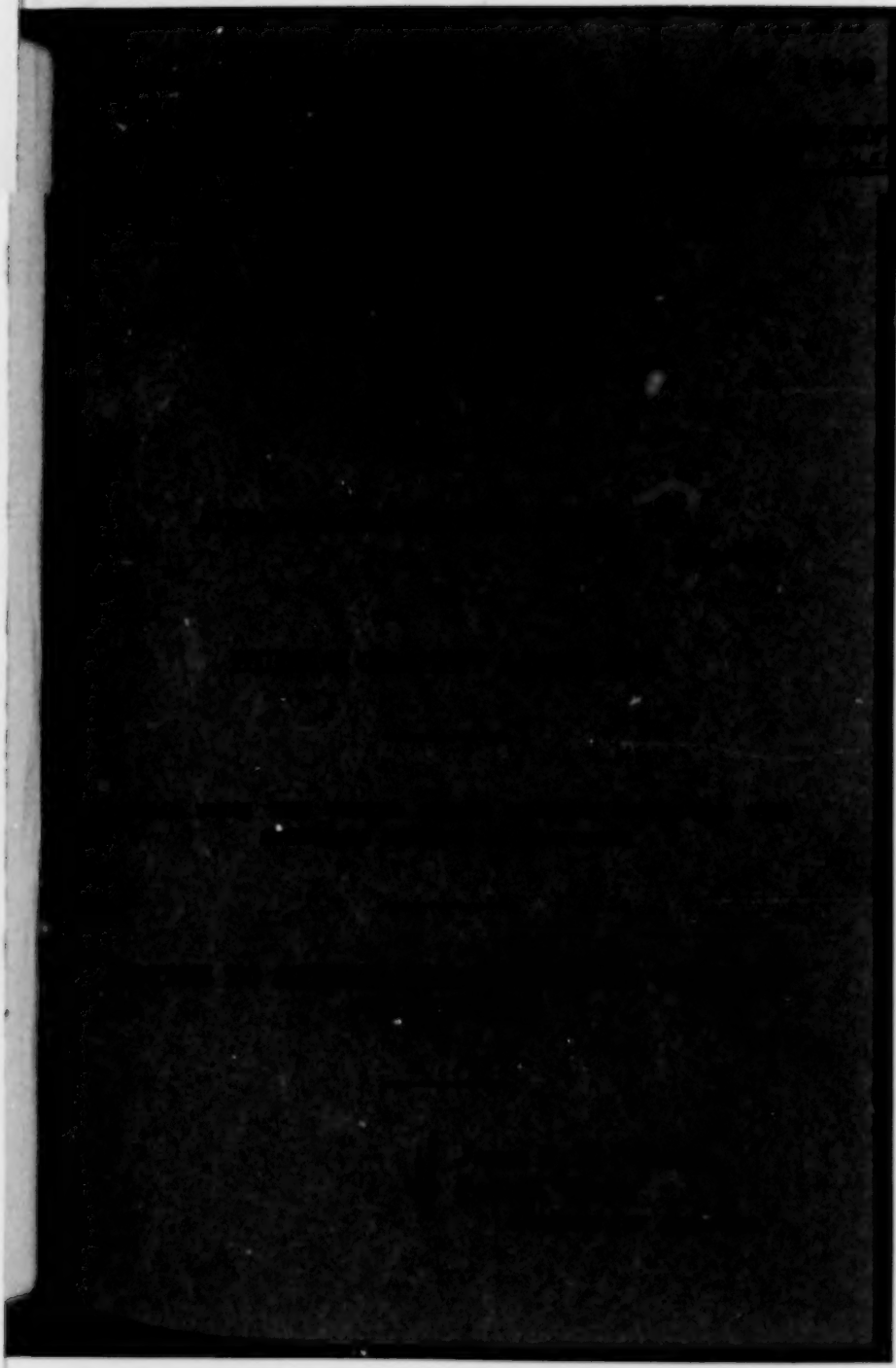

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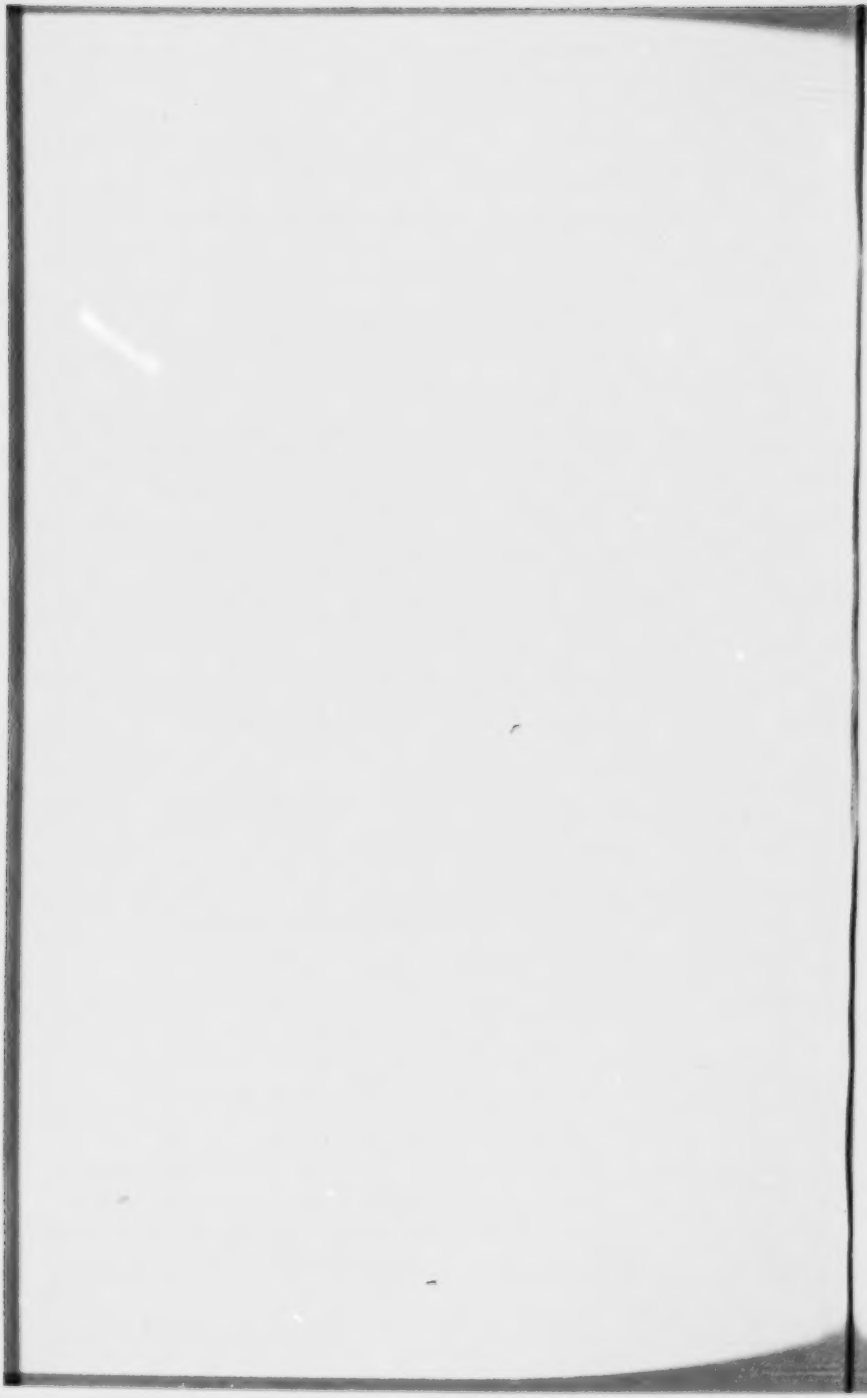

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No. 44-326

HUDSON TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants

MOTION TO AFFIRM

To Martin J. Kelly, Jr., Esq., Attorney for Defendant-Appellant, Adirondack Transit Lines, Inc., 70 Pine Street, Borough of Manhattan, City of New York, New York:

SIR:

Please take notice that the plaintiff-appellee, Hudson Transit Lines, Inc., does, pursuant to Rule 12, Paragraph 3, and pursuant to Rule 7, Paragraph 4, move to affirm the order and decree of the District Court in the above entitled cause upon the ground that the questions involved in the appeal to the Supreme Court of the United States are so unsubstantial as not to need further argument, and that the Statement as to Jurisdiction filed by the appellant does not disclose any adequate statement of grounds indicating

that the questions involved are substantial as required by Rule 12, Paragraph 1. In this motion, we shall rely upon the Statement Against Jurisdiction annexed hereto and filed herewith.

Dated: April 5, 1949.

Yours very truly,

SAMUEL WEISS,
Attorney for Plaintiff-Appellee,
Hudson Transit Lines, Inc.,
535 Fifth Avenue,
Borough of Manhattan,
City of New York, N. Y., and
JAMES F. X. O'BRIEN,
Attorney for and of Counsel With
Plaintiff-Appellee,
Hudson Transit Lines, Inc.,
17 Academy Street,
Newark 2, New Jersey.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 44-326

HUDSON TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants

STATEMENT AGAINST JURISDICTION

Pursuant to Rule 12, Paragraph 3 of the Supreme Court Rules, Hudson Transit Lines, Inc., plaintiff-appellee herein, presents this Statement Against Jurisdiction, and respectfully submits that the questions involved in the instant appeal to the United States Supreme Court are so unsubstantial as not to need further argument.

Statement of Facts and Issue Involved

Defendant-appellant, Adirondack Transit Lines, raises the issue that the statutory Court below usurped the function of the Interstate Commerce Commission, and substituted its judgment and discretion for that of the Commission. The alleged issue is a fictitious one when considered in the light of the record facts and of the long

standing and fundamental decisions upon the law involved, rendered by both the Commission and the Courts in interpreting Section 207(a) of the Interstate Commerce Act, Part II, and more particularly that part thereof which interpreted the meaning of the words "public convenience and necessity" as contained in that Section.

The record facts are not conflicting. There is not and never has been any real factual disagreement between the parties upon the instant record.

The real issue raised by appellant is an unsubstantial one. Adirondack wants the Court to nullify the interpretation of the above mentioned words in Section 207 (a), to wit, "public convenience and necessity," as made by the Interstate Commerce Commission itself in a great many decisions, and by the Courts including this Court in and ever since the case of—

Texas & N. O. R. Co. v. *Northside Belt Ry. Co.*, 276 U. S. 475, at 479.

In that case, this Court held that the underlying purpose of requiring proof of public convenience and necessity is to prevent the institution of superfluous lines not required in the public interest,—obviously with the thought of ultimate protection of the traveling public itself. The Court there said that the use of the phrase "public convenience and necessity" in the above respect meant:

> "The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

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When the Motor Carrier Act of 1935 was passed (it is now Part II of the Interstate Commerce Act), and the Interstate Commerce Commission was called upon to give judicial interpretation of the statutory requirement that a certificate be issued only on proof of public convenience and necessity, that Commission went to the decisions of the United States Supreme Court, and the decision in particular above mentioned, and found that Congress meant in the Motor Carrier Act by the use of the above mentioned words the same thing that had been meant in other utility regulatory legislation dealing therewith, and the Commission adopted as its interpretation of that portion of the Act of Congress the very meaning quoted by this Court in the case of *Texas* v. *Northside Belt Railway Co., supra.*

The Commission further said in its first principal decision involving motor carrier passenger lines above mentioned, to wit, the case of—

Pan-American Bus Lines, reported in 1 M. C. C. 190,

in addition to that portion above mentioned, the following (at page 202 of that Commission decision):

> "Section 207 (a) of the Motor Carrier Act is similar in general to section 1 (18) of the Interstate Commerce Act, above quoted, and both employ the expression 'public convenience and necessity.' The words 'convenience' and 'necessity' are used conjunctively, and we have found that they are not synonymous but must be given a separate and distinct meaning. Atlanta & St. A. B. Ry Co. Application, 71 I. C. C. 784."

There have been so many Commission decisions adopting and stating this same interpretation of those words in the Act that to merely list them would fill more pages than all of the matter herein contained. To mention a few of them,

we quote from the following Interstate Commerce Commission decisions:

Common Carrier Application of Bluenose Bus Co. Ltd., reported in 1 M. C. C. 173, 1 F. C. C. 8, and considered apparently at the same time as the *Pan-American* case, with the decisions being handed down only a few days apart. In that case, the Commission said, in denying the application (at p. 176):

> "The fact that in isolated cases the present operating bus line was unable to carry passengers on scheduled trips is not a sufficient basis to justify the Commission in granting a certificate of public convenience and necessity to another bus line, unless it be shown that the present bus lines, railroads, and steamship facilities are inadequate and inconvenient to the traveling public, and that the proposed facility will eliminate such inadequacy and inconvenience. No such showing was made by applicant herein."

In the case of Ohio Transportation Co.—Common Carrier Application, 29 M. C. C. 513, the Commission said (at p. 520):

> "Under the provisions of the act, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public proposed to be served, but also that it is a necessity on the part of such public. The latter element includes a showing that present facilities are inadequate and is aside from evidence of willingness and ability of the carrier to engage in interstate operations."

In the case of Craig Trucking Co.—Extension, reported in 46 M. C. C. 333, and 4 Federal Carriers Cases, 505, the Commission said:

> "No doubt a grant of authority to perform the proposed operations would be a convenience to applicant and to the shippers. This alone, however, is not suffi-

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cient to prove public convenience and necessity. The question of public convenience and necessity is in substance, whether the new service will serve a useful purpose responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant in a new operation or service without endangering or impairing the operations of existing carriers contrary to the public interest. Necessity does not exist unless the inconvenience would be so great as to amount to an unreasonable burden on the community. Before an additional carrier may be granted authority to compete with existing carriers, there should be convincing evidence that they are unable or unwilling to meet any reasonable demands that may be made upon them. No such showing has been made here."

In the case of Isadore Karzen, Contract Carrier Application, 31 M. C. C. 613, the Commission said (at pp. 615-616):

> "Applicant contends that protestants made no showing that existing service to the points in question is adequate to meet the shipper's needs. The burden of proof is upon applicant to establish affirmatively that the proposed operation is consistent with the public interest and the national transportation policy, and that such service cannot be rendered by existing carriers. We have repeatedly stated that existing carriers are entitled to handle the traffic available unless it is shown that there is a deficiency in the existing service."

In the case of Royal Cadillac Service, Inc., Common Carrier Application, reported in 43 M. C. C. 247, where the Commission said :

> "We have consistently held that where authority is sought to engage in motor carrier operations, *and to serve a portion of the public already served by other carriers,* the burden is upon applicant to show that such carriers are not rendering a type or character of service which satisfies the public need, and that the proposed

service will tend to correct or substantially improve that condition." (Italics ours.)

The pertinent section of the Act has a fixed, clear and definite interpretation of long standing.

Now, appellant wants this Court to reverse and nullify the whole body of law interpreting the Act, which gives to the motor carrier industry the legal yard stick by which public convenience and necessity may be proven in any given case. Adirondack wants this Court to say in effect that the Interstate Commerce Commission can give a different meaning to those words of Congress in each case before it, and can totally disregard the requirement of law enacted by Congress through the medium of just saying that in the Commission's discretion a certificate should be granted irrespective of the proof of record.

Adirondack wants all legal standards, which give meaning to the words of Congress according to the interpretation of both the Commission and the Courts, bodily thrown out the window. It claims that the Commission should be permitted, in passing upon an issue of public convenience and necessity, to disregard the record proof and to fall back on "its discretion," even in the absence of substantial evidence to support the findings and conclusion reached.

To do what appellant asks would be to change the statutory regulation of the Commission from a regulation by orderly process of law to an entirely arbitary regulation by men. Indeed, in argument before the Court below, when pressed on that issue, the respondents took the bold stand that the Commission had the right to act as it saw fit because it had discretion, and that there was no fixed meaning or legal standard by which its acts could be tested in passing upon the issue of public convenience and necessity.

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No substantial issue is presented by appellant—instead, appellant seeks to twist and turn wordings in other decisions of this Court to support its contention that the Commission can do what it pleases in any given case, and can exercise not only discretion but judgment without basis of support by substantial evidence and adequate findings. Appellant forgets that before discretion can be exercised, there must be at least the minimum of legal basis in the form of substantial evidence upon which to exercise that discretion.

Discretion is not a substitute for substantial evidence. If it were, there could be no such thing as an appeal to the Courts to reverse an administrative determination because that determination lacked the support of substantial evidence and adequate findings. If discretion were a substitute, as appellant contends, there would be no legal standards to use as a yard stick in determining whether or not the statutory requirements were met, and in this manner appeal to the courts would be made a futile waste of time and effort.

For the reasons above mentioned, we respectfully urge that the issue raised by appellant is fictitious in fact and unsubstantial in law. The determination of the Court below was based on the uncontradicted record facts and upon the law of Congress as it has long been interpreted by the Commission and the Courts.

The pertinent facts may be briefly summarized as follows:

Adirondack Transit Lines, Inc., filed an application under Section 207(a) of the Act, which required it to prove convenience and necessity, and the type, character and territory involved in that application brought into play the law as laid down by the Interstate Commerce Commission in the *Lincoln Tunnel* cases, reported in 12 M. C. C. 184.

The effect of this was to require the applicant to prove public convenience and necessity for its operation in the area which would be particularly affected by the change in approach to New York City through use of the Lincoln Tunnel. This meant that in the competitive short haul and commuter area served by Hudson Transit Lines, Inc., and other carriers, Adirondack had to prove the legal requirements making up public convenience and necessity as required by the Act, as it had been interpreted as above mentioned.

Adirondack offered no proof of public convenience and necessity except with relation to its long haul operations beyond Monroe, New York, and beyond the short haul and commuter area south of Monroe, where Hudson Transit Lines and other carriers were authorized to so serve the traveling public. Adirondack did place into evidence at the instance of Hudson Transit and other protestants a certain few records of passengers it had carried, and which it had brought to the hearing, and which obviously contained the most favorable extracts in relation to the period of carriage that Adirondack could find. These showed that even under the most favorable selection and interpretation, Adirondack Transit, in the stretch from Paramus, New Jersey, through New Jersey, and along that portion of New York up to Monroe, a distance of about twenty-eight miles, according to its own statistics, only carried an average of ¾ of one passenger per Adirondack trip between New York City and this entire twenty-eight mile stretch. The fact is that this stretch was mere passage territory for Adirondack for its operations from New York City to points beyond Monroe. Adirondack sought the right to an unlimited certificate along this stretch, foot by foot over the same highway certificated to Hudson Transit Lines, Inc. and other carriers, and where Hudson

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Transit Lines had spent large sums of money and ten years of hard effort to build short haul and commuter service from points along that stretch to and from New York City. The record shows that the number of trips operated by Hudson Transit were such that the number of passengers carried by Adirondack, as shown by its exhibits in the case, only amounted to about one Adirondack passenger for every four or five trips operated by Hudson Transit, or approximately 1/5 of one passenger per Hudson Transit trip.

The analysis of the figures in Appendix B of the Commission's decision, or of applicant's Exhibits 9 through 11C, also supports the record proof that Adirondack only carried those passengers because of the fact that it owned and controlled the Dixie Terminal in New York City, out of which both Adirondack and Hudson operate, and that when it had empty seats it put the passengers, who normally would be Hudson's passengers, into those empty seats, and that this carriage was occasional, sporadic, and unsubstantial in relation to the total numbers carried. The above analysis discloses that Adirondack carried them out of the terminal through that control, but made no provision for the return of those passengers who had to use Hudson Transit and the other carriers en route for their return trip. Adirondack made no provision for and failed to carry on the return trip 85 per cent of the passengers it carried from New York City to the disputed New Jersey points, and failed to carry back 93 per cent of the passengers carried from New York City to the disputed New York points south of Monroe. Adirondack's allegation of passengers carried indicates upon analysis that it could not even support the lesser proof required of a Grandfather operator, much less an operator seeking a new certificate upon proof of public convenience and necessity under Sec-

tion 207(a) of the Act. In dealing with this type of proof, this Court said in the case of—

> *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475 (bottom p. 480 to top p. 481):
>
> "Substantial, as distinguished from incidental, sporadic, or infrequent service, is required."

In the light of the multiple service and numerous trips rendered by Hudson Transit Lines (and in addition the record shows Mountain Transit and Greyhound served this territory), and in the light of the sporadic and unsubstantial character of the incidental passengers which Adirondack carried during the period that it unlawfully operated, it surely cannot be said that such proof would satisfy the requirement that a finding of need for a new operation be supported by substantial evidence.

This Court said in the case of *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, that substantial evidence meant the following:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

In the light of the above decision by this Court, it is clear that on the above mentioned evidence, no reasonable mind could say that there was need for a new operation in this territory in competition with the existing carriers, who were fully and adequately serving the public. Therefore, the Court below had to find that there was no substantial evidence to support the erroneous conclusion of the Commission, which it reversed.

The fact is that Adirondack conceived the idea of using its surplus buses to crash the short haul and commuter service built up through ten years of Hudson's effort in this territory. It was to prevent such destructive compe-

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tition that Congress required that public convenience and necessity be proven, because such destructive competition usually leaves the public in the long run without any adequate service. If appellant's contention were correct, and the Commission could act regardless of the statutory requirements and standards, and regardless of the proof in the case, then all regulation would be stultified, and the Act of Congress would be made a nullity. In this case, the Interstate Commerce Commission heard the case. There was a carefully considered Examiner's Report, which substantially supported Hudson's position. There was an appeal to Division 5 of the Commission by all parties, and Division 5, in a long and carefully considered decision dated July 3, 1946, supported Hudson's position and explained the findings of the Examiner. The commission in that decision definitely found that there was no need for the proposed service for that portion of the route south of Monroe, and that the public need in that territory was being adequately filled by the existing carriers other than Adirondack. This long, detailed and carefully considered decision of the Commission, documented as it was by an analysis of the exhibits, was appealed by Adirondack to the Commission as a whole, which after further consideration affirmed the decision of the division, and accepted its determination as of the entire Commission. Then Adirondack filed a second Petition for Reconsideration, contrary to the Commission's rules of procedure, and without any hearing the Commission referred the matter back to Division 5, which then handed down another decision, which still adopted the findings made in the prior decision, but which added a few vague paragraphs (it is hard to know whether these paragraphs were findings of fact or mere reference to Adirondack's claims), which were unsupported by any proof in the case, and indeed contrary to the uncontradicted proof in the case. Then, the

Commission, having inserted an unsupported justification, reversed its prior conclusion and ended up with a finding of public convenience and necessity for an operation for which it made specific findings (the findings in the prior report were adopted except where specifically changed in the new report, and the essential ones were not changed), that there was no need due to the fact that the public need was being adequately filled by existing carriers.

The second report is analyzed in the decision of the Court below, which found nothing in the record to justify the conclusions there reached. This Court has held that an order of the Commission must be supported by the record facts. *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258, and in the case of *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, this Court said:

> "A finding without evidence is beyond the power of the Commission."

The Commission has no right to act arbitrarily and contrary to the evidence of the case, and that is what it did in the decision and report complained of. This is made all the more apparent when we realize that the Commission protected all of the local carriers south of Monroe, and did not change its decision of denial with respect to them, but drew an arbitrary line at that point and changed its conclusion for the competitive territory we are interested in on the same record set of facts.

There is an obligation on the part of the Commission to observe the statutory standards prescribed by Congress, and it has no right to apply one test to some of the protestants in the case and, on the identical set of facts, another test or standard to us.

See—*United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475.

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In the case of *Loving* v. *United States*, 32 Federal Supplement, 464, affirmed on opinion below in 310 U. S. 609, the Court, in referring to the acts of the Commission, said:

> "But it must not act arbitrarily or capriciously in the considering of evidence presented to it."

That is exactly what the Commission did in its second decision and order complained of.

In this case, appellant has cited in support of its position the following cases:

United States v. *Carolina Freight Carriers Corp.*, 315 U. S. 475.

A reading of this case makes clear that appellant is in error, and that the Court below was correct in insisting that the statutory standards be followed by the Commission.

Texas & Pacific Railway Co. v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266.

This is not a case in point, but was an injunctive proceeding by one railroad against another involving conflicting testimony of whether a certain track construction was track extension or an industrial spur. Obviously, on conflicting testimony, the Commission had a right to use its expert judgment and discretion in resolving this conflict. In the instant case, we have no conflict, but indeed clear, uncontradicted proof supporting the Court below.

Virginia Stage Lines v. *United States of America*, 48 Federal Supplement 79.

This case is not in point because we do not question the fact that on an appropriate record, and based upon lawful proof, the Commission may authorize a new service to provide the public with the benefits of competition where the facts show that it is required in the public interest.

The Court below readily recognized this to be the law, but pointed out that that was never an issue in this case. Judge Swan, concerning this, said:

> "No such finding has here been made, nor is there any evidence to support such a finding."
>
> *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35.

This case is not one like the instant case where the Commission authorized a new line out of thin air, or out of its imagination. In the *Chesapeake & Ohio* case above mentioned, this Court sustained the action of the Commission in authorizing the new railroad line because of clear record proof of its need and of the inadequacy of the existing facilities. The record proof showed that not only would the proposed new line eliminate dangerous grades requiring costly operation, but that it would serve the users more safely and more efficiently, and save a substantial sum per ton in transportation, and the Commission, upon adequate proof, found that there was a need for this new construction to eliminate intolerable conditions in the existent operation there conducted. In the instant case, not only is the record devoid of any substantial evidence of need, but indeed the Commission in its specific findings has said that there is no need for the new Adirondack operation south of Monroe. The *Chesapeake & Ohio* case and the instant case are entirely different, since in the instant case there is no substantial evidence to warrant the conclusion reached.

> *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60.

Appellant attempts to use this case as the keystone of its argument. The only way in which it could do that is by misconstruing the Court's decision. An analysis of that case indicates that it supports the position taken by the Court below. Indeed, Judge Swan cited it as support

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for the statutory court's decision. No one quarrels with the law cited from that case by appellant, to wit, that Congress made the Commission the body to determine whether additional motor carrier service is required by the public convenience and necessity, and that the Commission has a right to exercise its administrative discretion in so determining. That does not change the fact that before the Commission can exercise such discretion, the statutory standards must be met by substantial evidence. In the *Parker* case, there was conflict of opinion between the majority and the minority, and a reading of both will disclose that on the issue here involved both majority and minority positions support the court below in the instant case. The *Parker* case was an application for auxiliary rail service by motor vehicle, and the record proof showed that there was no such type of service existent and available for use by the public. There were regular motor carriers serving in substance the same points, and the issue arose as to whether the record disclosed substantial evidence of need for the new rail motor carrier auxiliary service in view of the existence of the straight motor carrier lines serving the points there in question. The Interstate Commerce Commission, in its determination, differentiated between the two types of service, and found that there was an obligation on its part, under the Act of Congress, to preserve the inherent advantages of the various types of transportation, and that to preserve the advantages of rail type transportation it was necessary to allow the use of auxiliary motor carrier service, and that this type of service was not being presently afforded to the public by any carrier, and that it differed from the straight motor carrier type of service being afforded by the protesting motor carriers. On such a state of facts, and there was substantial evidence to support those findings, the Commission was within its bounds in determining that there was need for

the proposed new operation because there was no existing similar facility. Proof of need and of inadequacy of existing facilities can appear in a record, either in the form of negative proof showing that there just is not any such facility available to the public, or in affirmative proof that there are existing facilities but that they are not caring for or filling the public need. In the *Parker* case, this element making up necessity and convenience as that term of the Act has long been interpreted, was proven by the negative proof of the non-existence of such type of facility.

Therefore, on analysis, the opinion of the majority in the *Parker* case in no way changed the requirement that the Commission act according to the lawful standards, but found that it had on substantial evidence made adequate findings which fulfilled the requirements of those standards.

The position taken by Mr. Justice Douglas in his dissent was that the Commission erred in holding that the two types of service were different. He said, in substance, that they were the same thing, and therefore the Commission could not issue a certificate in the absence of proof of inadequacy of the existing straight motor carriers. This dissent, therefore, was based not upon any argument between the majority and minority concerning the lawful standards to be proven under the Act, but rather on a factual or practical interpretation of factual evidence touching upon the type of facility. Indeed, Justice Douglas made this clear when he said in his dissent:

> "For, if any applicant other than a railroad affiliate were before the Commission with an application for a certificate to serve this precise territory, it would have to show that existing transportation facilities were inadequate to serve the needs of the public efficiently."

Thus, both majority and minority uphold the legal standards inherent in the interpretation by both the Commission and the Courts in their interpretation of the elements mak-

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ing up necessity and convenience, as contained in Section 207(a) of the Act.

Conclusion

The court below bent over backwards to give Adirondack Transit Lines, Inc. more than the full benefit of the record proof. The only proof touching upon necessity and convenience was the proof showing Adirondack's past operations, both the type thereof, and the infrequent, sporadic and unsubstantial nature thereof in the territory in question. Although, as hereinabove shown, this could not constitute substantial evidence upon which to predicate a grant, the Court, nevertheless, provided in its order that Adirondack could be permitted by the Commission to continue the same type of operation that it had conducted during the period of its illegal operation. Thus, the Court gave Adirondack more than it was entitled to, and Adirondack has no just or substantial claim on this appeal.

The affirmance by this Court on the Motion annexed to this Statement Against Jurisdiction will clearly settle and affirm the interpretation of Section 207(a) of Part II of the Interstate Commerce Act, long and continuously adopted by the Interstate Commerce Commission itself, and accepted by this Court, as shown upon an analysis of this Court's decisions therein. It will re-affirm that Congress in using the words "public convenience and necessity" meant exactly what this Court said those words meant in the case of *Texas & N. O. R. Co.* v. *North Side Belt Railway Co.*, 276 U. S. 475, and as followed ever since that time in numerous Interstate Commerce Commission decisions.

There is nothing new or complicated in this case except appellant's attempt to twist isolated words or phrases from decisions of this Court into meanings utterly contrary to those intended.

No substantial issue is presented by this appeal. In the light of the law enunciated by this Court requiring support

by substantial evidence, it is clear on uncontradicted proof that the court below was correct in reversing the Commission decision because it was unsupported by any substantial evidence.

It would be unthinkable, at this late date, to substitute arbitrary and capricious discretion for the legal standards defining the meaning of public convenience and necessity. This Court cannot accept appellant's contention and preserve regulation by orderly process of law.

Because this is nothing more than an appeal seeking to discard the fixed Congressional standards long adopted by the Interstate Commerce Commission and the Courts, the appeal should be dismissed, and the judgment below affirmed on our motion.

Respectfully submitted,

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and

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Hudson Transit Lines, Inc.
17 Academy Street,
Newark 2, New Jersey.

Dated: April 6, 1949.

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